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IN THE

Supreme Court of the United States

JANUARY TERM, 1947

No. 837

BERNARD LICHT, HERMAN J. LICHT and HARRY LICHT,
Petitioners and Appellants Below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of Bernard Licht, Herman J. Licht and Harry Licht respectfully shows:

I

Summary statement of the matter involved

Petitioners were convicted by a jury after a trial in the United States District Court for the Southern District of New York (R. 1) upon an indictment (R. 6) charging

them, under two separate counts, with the crimes of CONSPIRACY (Title 18, Sec. 88, U. S. Code) to violate subd. (1), Sec. 52b, Title 11, U. S. Code, and of WILFULLY CONCEALING ASSETS OF A BANKRUPT FROM A TRUSTEE IN BANKRUPTCY (Title 11, Sec. 52, subd. (1), U. S. Code).

Each petitioner was sentenced to imprisonment for one year and one day on both counts, the sentences to run concurrently. In addition, Bernard Licht and Herman J. Licht were fined $1,000 and Harry Licht $5,000 to cover both counts (R. 4-5).

Petitioners appealed to the United States Circuit Court of Appeals for the Second Circuit upon the ground, among others, that the prosecutor's unwarranted insinuation that petitioners Herman J. Licht and Bernard Licht had falsified their statements to the draft board, and the prosecutor's injection of the war as an issue, prejudiced petitioners' substantial rights, and deprived them of a fair trial.

The Circuit Court, in an opinion by JUDGE SWAN concurred in by JUDGE CLARK, affirmed the conviction (R.), JUDGE FRANK *dissenting* on the ground that in so close a case as the one at Bar, the aforementioned errors were prejudicial and required the granting of a new trial (R.).

The questions presented are:

(1) Whether it is prejudicial error in a criminal case admittedly deemed close by the trial judge and based solely on circumstantial evidence (R. 749) for the prosecutor to make unwarranted insinuation that the defendants Herman J. Licht and Bernard Licht had falsified their draft status, and to inject the war as an issue to inflame the passions and prejudices of the jury; and

(2) Whether it is prejudicial error for the Trial Court to fail adequately to cure such error by proper instruction to the jury and admonition to the prosecutor.

The defendants were tried while World War II was in progress. At five separate times in his summation the prosecutor irrelevantly referred to the war in the following terms:

(1) "I am talking about lies, prewar and postwar varieties, and with the Lichts, there is no change because of the war; * * *" (R. 675).

(2) The prosecutor referred to the two younger defendants as "the young boys, who in 1941 were 28 and 26 respectively" (R. 699). This was an obvious reference to the fact that they were of draft age.

(3) Referring to Bernard Licht, he said, "Although it has nothing to do with this case, I think he lied in putting in answers on his questionnaire * * *" (R. 699-700). This was objected to by the defense counsel, and was followed by a mild reminder by the trial judge to disregard the argument (R. 700).

(4) "A lot has gone on since December, 1941. It is unfortunate to see a father and two sons on trial. I do not think you will waste any crocodile tears over the fact that in this particular case we have a father and two sons on trial. A lot more tragic and horrible things have happened * * *" (R. 703). This was objected to by defense counsel, but the court did not rule on the objection, merely telling the prosecutor to "go ahead and sum up".

(5) The prosecution stated that its entire case rested on the fact that the burglary of defendants' store was a "phony burglary" (R. 674). Then referring to the possibility of the "real burglars" showing up, the prosecutor said "There is about as much chance of them showing up as the Japanese have of winning the war * * *" (R. 696).

The prosecutor throughout his argument sought to show by innuendo and subtle remarks that the defendants, at least the two younger ones, were draft dodgers, and that the war had meant no change for them while it

affected countless others. The purpose of these statements was to inflame the passions and prejudices of the jury against the defendants and introduce irrelevant issues.

The Trial Court, in granting bail pending appeal, stated:

> "It was a purely circumstantial case. I rather thought the jury would acquit. I think I expressed my idea at the time that it was not the strongest case in the world and I wouldn't have been surprised had the jury acquitted" (R. 749).

Under these circumstances, prejudicial remarks by a prosecutor during his summation tending to incite the passions and prejudices of the jury against the defendants, cannot be considered mere harmless error, but highly prejudicial error substantially swaying the judgment of the jury.

Moreover, it was mandatory for the Trial Court to act of its own volition to prevent the continuous course of misconduct by the prosecutor, and to stress the irrelevancy of such statements in strong language to the jury.

The prosecutor's improper conduct and the Trial Court's failure to correct that error prevented petitioners from receiving a fair trial on the issues.

II

Reasons relied on for allowance of the writ

1

The decision of the Circuit Court of Appeals for the Second Circuit is in direct conflict with the applicable law established by this Court and by the various Circuit Courts which hold that irrelevant appeals to the passions

and prejudices of a war-time jury constitute prejudicial error in a case involving close questions of fact.

2

The decision of the Circuit Court of Appeals for the Second Circuit deeming non-prejudicial the failure of the trial judge to emphatically instruct the prosecutor to refrain from making irrelevant appeals based on the war in a war-time trial involving close questions of fact, and his failure to emphatically instruct the jury to disregard these statements of the prosecutor, sanctions so far a departure by the Trial Court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

3

The decision of the Circuit Court of Appeals for the Second Circuit deeming non-prejudicial the prosecutor's unwarranted innuendo that the defendants Herman J. Licht and Bernard Licht had falsified their statement to the draft board and the prosecutor's improper appeal to the jury based on the war, in a trial involving close questions of fact, departs so far from the accepted and usual course of judicial proceedings, and sanctions so far a departure by the Trial Court and the prosecutor from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, directing said court to certify and send to this Court a full and complete transcript of the record and proceedings of the said Circuit Court had in the case numbered and entitled

on its docket, Calendar No. 20336, "United States of America, Appellee v. Bernard Licht, Herman J. Licht and Harry Licht, Defendants-Appellants", to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such further relief as to this Court may seem proper.

Dated, New York, December 28, 1946.

BERNARD LICHT,
HERMAN LICHT and
HARRY LICHT,

By JAMES D. C. MURRAY,
Counsel for Petitioners.

ABRAHAM J. GELLINOFF,
ARNOLD H. FASSLER,
Of Counsel.

IN THE

Supreme Court of the United States

JANUARY TERM, 1947

No. .....

BERNARD LICHT, HERMAN J. LICHT and HARRY LICHT,
Petitioners and Appellants Below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below

There was no opinion rendered by the Trial Court. The opinion of the Circuit Court below and the dissenting opinion, rendered on December 3, 1946, is still unreported, but is contained at the end of the record (R.).

II

Jurisdiction

1. The decision of the Circuit Court below was entered on December 3, 1946, but the issuance of its mandate on

appeal has been suspended by stipulation, dated December 10, 1946, entered into between counsel for the appellee and the appellants, until the determination of the instant application by this Court.

2. The statutory provisions believed to sustain the jurisdiction of this Court are Title 28, Section 347, U. S. Code, subdivision a (*Judicial Code, Section 240a, as amended*) and Rule 38 of the Revised Rules (1939) of this Court.

3. The reasons stated in the preceding petition under II (pp. 4, 5, *supra*) are herewith adopted and made part of this brief, and are believed to constitute good grounds for invoking the jurisdiction of this Court.

III

Statement of the Case

This has already been stated in the preceding petition under I (pp. 1-4, *supra*) which is hereby adopted and made a part of this brief.

IV

Specification of Errors

The Circuit Court erred in holding that it was not prejudicial error (1) for the prosecutor to make irrelevant and prejudicial statements concerning the war and the draft status of the appellants in a case admittedly deemed close by the Trial Court; and (2) for the Trial Court to fail to correct and stop such error by proper instruction to the jury and admonition to the prosecutor.

ARGUMENT

A

To determine whether an error substantially affects the rights of an accused to his prejudice or is harmless, the crucial test is the impact of the thing done wrong on the minds of the jury considered in the total setting. The inquiry cannot be merely whether there was enough to support the result apart from the error. It is rather whether the error itself had substantial influence. If so, or if one is left in grave doubt, a conviction cannot stand.

Kotteakos v. *United States*, — U. S. —, 66 Sup. Ct. 1239;
Bollenbach v. *United States*, 326 U. S. 607, 614.

B

The Circuit Court erred in holding that the prosecutor's references to the war and his unwarranted innuendoes that the defendants were draft dodgers did not constitute prejudicial error. At a time when passions and prejudices are heightened by participation in a war, remarks of a prosecutor reflecting upon the defendants' participation in the war effort are highly prejudicial and offensive to the dignity and good order with which court proceedings should be conducted. It is the duty of the Trial Court to stop the prosecutor's discourse without waiting for an objection.

Where the misconduct of the prosecutor is not confined to a single instance, but persistent, the cumulative effect upon the jury is consequential and destroys a calm consideration of the rights of the defendant. The virus thus implanted in the minds of the jury is not easily extracted, and in a close case, nothing short of immediate and

emphatic censure of the prosecutor by the Trial Court can remove the prejudicial error. The Trial Court in the instant case, although deeming it a close case, failed to so act, and prejudicial error was committed against the defendants, depriving them of a fair trial.

Viereck v. *United States*, 318 U. S. 236, 247-8;
Berger v. *United States*, 295 U. S. 78, 85, 88-9;
August v. *United States*, 257 Fed. 388, 393 (C. C. A. 8th Circ.);
Elmer v. *United States*, 260 Fed. 646 (C. C. A. 8th Circ.);
Hall v. *United States*, 256 Fed. 748 (C. C. A. 4th Circ.);
People v. *Levan*, 295 N. Y. 26, 36;
People v. *Esposito*, 224 N. Y. 370, 374;
E. A. Strout Farm Agency, Inc. v. *De Forest*, 201 App. Div. 777, 195 N. Y. S. 101;
Grigsby v. *Commonwealth*, 299 Ky. 721;
Eiland v. *State*, 95 Tex. Crim. Rep. 525.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision of the Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

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Counsel for Petitioners.

ABRAHAM J. GELLINOFF,
ARNOLD H. FASSLER,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 837

BERNARD LICHT, HERMAN J. LICHT AND HARRY LICHT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 834–842) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 3, 1946 (R. 842). The petition for a writ of certiorari was filed January 2, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether certain remarks in government counsel's argument to the jury constituted reversible error.

STATUTE INVOLVED

Section 29b of the Chandler Act of June 22, 1938, c. 575, 52 Stat. 855 (11 U. S. C. 52 (b)), provides in pertinent part as follows:

> A person shall be punished by imprisonment for a period of not to exceed five years or by a fine of not more than $5,000, or both, upon conviction of the offense of having knowingly and fraudulently (1) concealed from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any proceeding under this Act, any property belonging to the estate of a bankrupt * * *.

STATEMENT

An indictment in two counts was returned against petitioners in the United States District Court for the Southern District of New York, the first count charging a conspiracy to conceal assets from the trustee in bankruptcy of H. J. Licht, Inc., and the second count charging the substantive offense of concealment (R. 6–8). The H. J. Licht Co. had been adjudicated a bankrupt on December 1, 1941, and approximately $400 was realized on the sale of its assets (R. 19–

20, 28). The indictment charged that petitioners conspired to conceal and did conceal from the trustee 990 fur coats and 10,000 dressed and dyed rabbit skins valued at approximately $26,275 (R. 6–8). On November 12, 1941, petitioners had reported the theft of these articles from the corporation's place of business at 337 West 17th Street in New York City (R. 36–37, 96–97, 234–236). The essence of the charge against petitioners was that the purported burglary was in fact staged in order to conceal these assets from the trustee.

The evidence for the Government may be summarized as follows:

H. J. Licht, Inc., was incorporated in the latter part of 1937 and was engaged in the business of manufacturing cheap fur coats (R. 449–452). Petitioner Bernard Licht was president of the corporation, and petitioner Herman Licht its secretary (R. 19). Petitioner Harry Licht is their father (R. 19). He worked for the corporation, directed the help which it hired (R. 609–612, 654), made purchases for it (R. 196–198, 639–641), and arranged for the rental of premises occupied by the corporation (R. 178–180). Until May 1941, the business was conducted at a factory and showroom at 307 Seventh Avenue, in New York City, a building occupied exclusively by furriers (R. 23). At that location, the corporation had two large storage safes with combination

locks of a type generally used for storage of fur coats and skins (R. 24, 35).

In May 1941, Harry Licht rented two stores in a tenement building at 337 West 17th Street, in New York City, in a residential section outside the fur district (R. 37, 71, 109, 120, 178–180). The premises had no protective devices against burglary, and petitioners carried no theft insurance on the merchandise kept there (R. 55, 364). Petitioners continued to maintain an office at the Seventh Avenue address (R. 34), and the existence of the 17th Street stores was kept secret from the corporation's creditors (R. 38, 365).[1]

The two stores were separated by a hallway leading from the street. One store, which was used by petitioners, was subdivided into a front and rear room. The rear room had a door leading into a toilet and from the toilet another door opened into the hallway. (R. 50–51; Ex. 5, R. 50, 762–786.) The other store was sublet to one Tassa, who finished fur coats for the corporation (R. 127–128).

From May to October 1941, Tassa had been accustomed to go from his premises to petitioners' by walking into the toilet, knocking on the door leading into petitioners' store, and being admitted

[1] When petitioners Bernard and Herman Licht took the stand in their own behalf, they testified that they rented the 17th Street store because of labor difficulties (R. 457, 459, 572–573). Herman Licht admitted, however, that picketing ceased in June 1941 (R. 458).

through that door (R. 128, 134). The door between the toilet and petitioners' store was always kept locked (R. 134). Some time in October 1941, Bernard Licht told Tassa that thereafter he would have to use the front door to make his deliveries (R. 131).

On November 12, 1941, the day after the Armistice holiday, when Tassa went into the toilet, he found the door leading to petitioners' store open and noted that the back room of the store was in disorder (R. 136–137). He notified petitioners, who were at their Seventh Avenue office (R. 137). Herman and Bernard Licht went to the 17th Street store and called the police (R. 139, 141).

New York City police officers testified that when they investigated the premises after the call from petitioners, they were informed by Herman Licht that nothing had been disturbed since the discovery of the burglary (R. 100, 234). They found empty cartons strewn throughout the store (R. 98), and the door between the store and the toilet was slightly ajar (R. 99). This door had a sliding bolt and hasp lock on the side facing the rear of petitioners' store (R. 237; Ex. 5b, R. 764). There were marks on the opposite side of the door facing the toilet, but no marks on the door between the hallway and the toilet (R. 106, 240). The detective found the hasp hanging down from the lower screw and the bolt

on the door fully extended. The upper screw from the hasp was found lying on the floor and the lower screw protruded about 1/8 of an inch (R. 99, 102, 104, 237). One of the detectives testified that the lower screw was "pretty solid" (R. 238). When he replaced the hasp in its proper position and bolted the door, the hasp did not yield to pressure (R. 105, 238). One of the detectives remarked at the time that the whole thing did not "look right" (R. 238).

An agent of the Federal Bureau of Investigation, who is an expert on tool marks, testified that he examined the premises in October 1943 (R. 304, 305), and that in his opinion, if the door had been forced from the toilet side sufficiently to force out the upper screw and cause the hasp to hang down so as to permit the door to be opened, the lower screw would have had to protrude 3/8 of an inch, because that much space was needed to permit the hasp to clear the bolt on the one side or the sash on the other (R. 319–320).

The cartons in which the allegedly stolen coats were reported to have been packed showed no signs of use (R. 49, 107). They were not normally used in the trade for keeping fur coats, since the packing of coats tended to spoil them (R. 140–146, 335).

About two weeks before the reported burglary, Herman Licht commenced efforts to collect the

corporation's two largest accounts receivable, although the accounts were not yet due (R. 265, 267, 283; Ex. 9, R. 259, 792–794). Over a six-day period, beginning October 25, he wrote three letters to Goldblatt Brothers in Chicago requesting that firm to anticipate its account (Ex. 9, R. 259, 792–794). When he received no response to his letters, he went to Chicago and obtained a check for about $3,000 from Goldblatts (R. 256, 343).[2] The proceeds of this check and money received from the other account, amounting in all to approximately $5,000, were deposited in the corporation's bank account in the early part of November (R. 283), and Herman Licht then told friends and relatives holding outstanding checks of the corporation to deposit them (R. 379, 380, 504). On November 10, 1941, the day before Armistice Day, checks totalling $4,105.00 cleared the corporation's bank account (R. 283). This was almost twice the amount that had cleared the account in any previous month (R. 285–286). Of this amount, $3,775 represented payments to relatives and friends and the balance of $330 consisted of payments to Herman and Herbert Licht (R. 283–285, 382–383, 386–389, 349–350). At the close of

[2] In his testimony at the bankruptcy proceeding Herman stated that he went to Chicago on a sales trip and incidentally picked up the check (R. 343–344). However, he was in Chicago only six hours, took no samples with him, and had previously dealt with New York representatives of the Chicago firm (R. 369, 370, 405, 511).

business on November 10, 1941, there was $105 in the corporation's bank account (R. 287). The corporation had paid only $979.07 to trade creditors in the period from November 1 to November 10, 1941 (R. 283). It had approximately $24,000 in liabilities due in the latter part of November and December (R. 281–282). Before Herman went to Chicago, petitioners had tried to sell their coats in New York, but had not succeeded in making sales (R. 371, 405). Between June 25 and August 25, 1941, Sears Roebuck, one of their largest customers, had returned $11,000 worth of merchandise to them (R. 526).

Several days after Armistice Day, petitioners announced to creditors the corporation's inability to meet their obligations because of a burglary (R. 22–23). At that time, Herman Licht assured the attorney for creditors that no loans had been repaid to relatives or friends since October 1941 (R. 55).

In September 1941, Harry Licht had obtained from a rabbit skin dealer on credit a large lot of skins, worth approximately $2,300; on the representation that the corporation had obtained a substantial order for coats, but he later admitted that the order had not been received (R. 196–198).

In the period from June to October 1941, funds were withdrawn by petitioners from the corporation's bank account by making out checks to the

order of a third person, endorsing that person's name on the checks and having them cashed at a check cashing agency (R. 82–84, 87–88, 395–396).

Bernard Licht conducted a business known as the Licht Fur Factory, using the same premises as the bankrupt corporation at 307 Seventh Avenue (R. 353). His business was the sale of coats to peddlers (R. 354), but he kept no regular set of books (R. 355–356). The bankrupt corporation kept no inventory of its merchandise (R. 366). Bernard Licht testified that he took and gave receipts on loose paper when he delivered or received merchandise, but that he had destroyed all such papers (R. 366–367). However, on Saturday, November 15, 1941, when the attorney for the creditors visited the 17th Street premises, he found an inventory which Herman said had been prepared by Bernard on November 4, 1941 (R. 33, 53; see R. 366).

Petitioners were convicted (R. 737). They were each sentenced to imprisonment for a year and a day, and Bernard and Herman Licht were fined $1,000, and Harry Licht, $5,000 (R. 748). On appeal, the judgments were affirmed (R. 842), one judge dissenting on the ground that certain remarks in the argument of government counsel constituted reversible error (R. 838–842). The facts involved in this issue are set forth in the Argument, *infra*.

ARGUMENT

The petition for certiorari is predicated solely on the contention that portions of government counsel's argument to the jury were unwarranted and prejudicial and therefore constituted reversible error. Taking a few sentences of a lengthy summation out of their context (Pet. 3), petitioners try to create the impression that government counsel relied on an appeal to prejudices engendered by the war rather than on the evidence in the case to sustain the charge against them. When the summation is read in its entirety (R. 672–707), however, it becomes clear that, as a whole, it is a careful and detailed analysis of the evidence, presented in a forceful but proper manner, and that some of the remarks of which petitioners complain were in answer to appeals to sympathy made by defense counsel in his summation (R. 655–672).

1. The first remark of the prosecutor quoted by petitioners is the statement, "I am talking about lies, prewar and postwar varieties, and with the Lichts there is no change because of the war" (R. 675; see Pet. 3). The rest of that sentence, however, reads, "the same lies in 1941 as you have had here since May 21st," i. e., lies in the court room at the trial. Counsel had just told the jury that the credibility of petitioners was a major issue in the case, and he followed the quoted statement, not with any reference to

extraneous issues, but with a detailed analysis of misstatements made by petitioners in their testimoney in the bankruptcy proceedings in 1941 (R. 676–690).

2. As to the statement that "There is about as much chance of them [the real burglars] showing up as the Japanese have of winning the war" (R. 696; see Pet. 3), it appears from its context that it was in answer to the statement by petitioners' counsel that it would be "an awful thing" if petitioners were convicted and the real thieves were later caught (R. 656), and to insinuations by the defense that the union might have had a motive to commit the burglary (see R. 247, 560–561, 665, 667).

3. The alleged references to Bernard and Herman being of draft age (see Pet. 3) occur in a paragraph which reads as follows (R. 699):

> As I summarize it Harry Licht lied about his activities in the business. He was there almost the whole time. You know that. Who would be the guiding spirit and the genius behind the thing, the young boys, who in 1941 were 28 and 26 respectively, or the father who had spent 21 years in the business? * * *

It takes considerable imagination to find in that remark in its context an appeal to war time passion and prejudice.

4. The prosecutor had been summing up various misstatements made by petitioners in their testi-

mony. As to Bernard, the prosecutor said (R. 699–700):

> * * * What did Bernard lie about? About the door, and about his father's participation in the business. Although it has nothing to do with this case, I think he lied in putting in answers on his questionnaire that except that he suffered from his feet in 1936—I think they were on his questionnaire—and when I asked him he said, "Yes," he told the truth. I asked him if his mother and father were complete invalids, and he told the truth about that—

At that point defense counsel objected, stating that the evidence had been excluded, and the judge stated that the jury should disregard the argument (R. 700).

On Bernard's cross-examination, the court had excluded questions concerning his physical condition (R. 595–596), but allowed the prosecutor to question him concerning statements in his selective service questionnaire that his father was too ill to work and that he was supporting his father and mother (R. 593–594). As the court below pointed out (R. 837), this cross-examination was properly allowed, since it bore, not only on the credibility of Bernard, but on the issue of his father's participation in the business. Hence, the instruction to the jury to disregard all references to the questionnaire was actually more favorable to petitioners than was warranted.

5. The final statement relied on by petitioners is one to the effect that much had happened since 1941, and that the jury should not shed crocodile tears over the fact that a father and two sons were on trial (R. 703). This was occasioned by defense counsel's frequent references to the fact that all the male members of the Licht family were on trial and his appeal not to convict a whole family (R. 655–656, 657, 660, 661, 671, 672). The prosecutor had merely said, "A lot more tragic and horrible things have happened," when defense counsel interrupted. After a colloquy, the judge told the prosecutor, "Go ahead and sum up" (R. 703). Thereafter no further reference to the war was made.

Considering the prosecutor's argument as a whole, and in relation to the prior summing up made by defense counsel, we submit that the prosecutor's conduct was within proper bounds and free of error. Hence, there is no occasion for invoking the harmless error doctrine. But, even if any of the challenged statements should be considered improper, we submit that, judged as it must be in the light of the whole case (see *Kotteakos* v. *United States,* Nos. 457–458, Oct. T, 1945, decided June 10, 1946), it would not constitute reversible error. Although the evidence was circumstantial, the circumstances pointed quite conclusively to guilt. The trial was otherwise free of error. The summing up by govern-

ment counsel was on the whole factual and sober. And the judge's charge to the jury included a detailed and careful review of the evidence on both sides, which the circuit court of appeals characterized as of "utmost fairness" (R. 835). Under such circumstances, we submit that even an offending remark by government counsel, if such there was, can not fairly be magnified and distorted into a prejudicial appeal to war-time prejudices. As Judge Swan said below (R. 837), "Incidental references to the war, just as to other facts of contemporary history, cannot be improper of themselves alone when not intended as inflammatory and having pertinency to the facts as developed in the record."

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947